Filed 5/22/19 Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROY ALLAN SLURRY SEAL, INC., et al., Plaintiffs and Appellants, v. AMERICAN ASPHALT SOUTH, INC., Defendant and Respondent.	B291036 (Los Angeles County Super. Ct. No. JCCP 4768)

APPEAL from an order of the Superior Court of Los Angeles County. Elihu Berle, Judge. Affirmed.

Doyle Schafer McMahon, Daniel W. Doyle and David Klehm, for Plaintiffs and Appellants.

Atkinson, Andelson, Loya, Ruud & Romo, Scott K. Dauscher, Paul G. Szumiak, and Jennifer D. Cantrell, for Defendant and Respondent.

In these coordinated actions, Roy Allan Slurry Seal, Inc. (Roy Allan) and Doug Martin Contracting Co. (Martin) (together plaintiffs) sued American Asphalt South, Inc. (American) in five Southern California counties for intentional interference with prospective economic advantage and two other claims after American was selected as the lowest bidder on 23 public works contracts. In the case filed in Riverside County, the trial court sustained a demurrer to plaintiffs' claims, and on appeal, we reversed the order on the interference claim, but affirmed on the other claims. Plaintiffs obtained review of our ruling on the interference claim, and the California Supreme Court reversed our decision, remanding with directions to reinstate the original order sustaining the demurrer in its entirety. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 522 (*Roy Allan*).)

After remand, the trial court entered judgment in the coordinated actions. In a concurrently filed opinion in a separate appeal, we have affirmed the judgment. (Case No. B289446.) In this appeal, American challenges the denial of its request for attorney's fees pursuant to Code of Civil Procedure section 1021.5 (section 1021.5) for the work done petitioning for review in the Supreme Court, litigating before that court, and litigating in the trial court after remand. The trial court denied the fees request because the case did not confer an important right affecting the public interest. We affirm the order, but on the ground that American failed to establish the financial burden element of section 1021.5.

BACKGROUND

The facts of this case are set out in detail in *Roy Allan*, so we only briefly summarize them here. Between 2009 and 2012, American outbid plaintiffs on 23 public works contracts in Los Angeles, San Bernardino, Riverside, Orange, and San Diego Counties. The total value of the contracts exceeded $14 million. In 2013, plaintiffs sued American in all five counties for intentional interference with prospective economic advantage, predatory pricing in violation of the Unfair Practices Act (Bus. & Prof. Code, §§ 17000, 17043), and injunctive relief under the unfair competition law (Bus. & Prof. Code, § 17200). (*Roy Allan, supra,* 2 Cal.5th at p. 510 & fn. 1.) According to the Riverside complaint, American won six public works contracts on which Roy Allan or Martin was the second lowest bidder. Plaintiffs alleged that American's bids were lower because it failed to pay prevailing wage and overtime compensation in connection with the contracts. Plaintiffs alleged their lost profits on the Riverside contracts were $168,511 for Roy Allan and $269,830 for Martin. (*Roy Allan, supra,* 2 Cal.5th at pp. 509–511.)

The trial court sustained a demurrer without leave to amend, and plaintiffs appealed. One week later, our Supreme Court ordered all five matters coordinated in Los Angeles Superior Court and in the Second District Court of Appeal for appellate purposes.

On appeal in the Riverside action, this Division issued a published opinion reversing the order sustaining the demurrer as to the interference claim and affirming as to the other claims. The California Supreme Court granted review limited to the interference claim and reversed our decision. It held that, in the highly regulated context of public works contracts, plaintiffs "had 'at most a hope for an economic relationship and a desire for future benefit,' " which could not state a claim for intentional interference with prospective economic advantage. (*Roy Allan, supra,* 2 Cal.5th at p. 510.)

Following the issuance of the remittitur, the parties litigated plaintiffs' motion for leave to file an amended complaint in the Los Angeles action, which was denied, and American's motion for judgment on the pleadings in the five coordinated actions, which was granted. The court entered judgment for American in the five cases, which we have affirmed in a separate opinion filed concurrently (B289446).

American moved for an award of attorney's fees of $603,308.22 pursuant to section 1021.5. American paid $281,577 to its attorneys, but it argued the requested amount represented the fair market value of counsel's work. It limited its request to the services rendered in petitioning the California Supreme Court for review, litigating in that court, and litigating the case after remand. In support of the motion, American argued it was the prevailing party, the lawsuit was necessary and conferred a significant benefit on California taxpayers, the financial burden of litigating the case outweighed American's financial benefit, and its fees were reasonable. Plaintiffs opposed, arguing that American's case did not result in enforcement of an important right affecting the public interest or confer a significant benefit on the public, and American's own financial interest outweighed the financial burden of pursuing the case. They also opposed American's "multiplier."

The trial court denied the motion, finding American's lawsuit did not confer an important right affecting the public interest. American appealed the order.

DISCUSSION

" '[E]ligibility for section 1021.5 attorney fees is established when "(1) plaintiffs' action 'has resulted in enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons,' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.' " ' [Citations.] ' "[Utilizing] its traditional equitable discretion," [the trial] court "must realistically assess the litigation and determine, from a practical perspective" [citation] whether or not the statutory criteria have been met.' " (*Summit Media, LLC v. City of Los Angeles* (2015) 240 Cal.App.4th 171, 187, fn. omitted (*Summit Media*).)

Although the trial court addressed only the public interest element, the parties briefed all the elements in the trial court. On appeal, American again briefed all the elements. Plaintiffs focused their briefing on the financial burden element. We review the trial court's decision, not its reasoning, and we may affirm on any basis presented in the record. (*Wal-Mart Real Estate Business Trust v. City Council of San Marcos* (2005) 132 Cal.App.4th 614, 625 [affirming denial of section 1021.5 fees on different ground than identified by trial court].) As we will explain, American's financial benefits substantially outweighed its cost to pursue the case in the California Supreme Court, which alone was sufficient to deny section 1021.5 attorney's fees. We need not address any other element. (See *Millview County Water Dist. v. State Water Resources Control Bd.* (2016) 4 Cal.App.5th 759, 773 (*Millview*) [finding insufficient evidence to satisfy financial burden requirement and declining to address other elements].)

I. Standard of Review

Generally, we review the decision to grant or deny attorney's fees pursuant to section 1021.5 for abuse of discretion. (*Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213 (*Whitley*); *Summit Media, supra,* 240 Cal.App.4th at p. 187 ["The trial court's judgment on whether a plaintiff has proved each of the prerequisites for an award of attorney fees under section 1021.5 'will not be disturbed unless the appellate court is convinced that it is clearly wrong and constitutes an abuse of discretion.' "]; see *Millview, supra,* 4 Cal.App.5th at p. 769.)

American urges us to apply a "special standard of review" because it seeks fees for litigation that resulted in a Supreme Court decision, citing *Los Angeles Police Protective League v. City of Los Angeles* (1986) 188 Cal.App.3d 1, 7 (*Police Protective League*). In *Police Protective League*, the court opined that, when a case results in a published appellate decision, less deference is warranted to a trial court's decision on entitlement to section 1021.5 fees because "[a]n appellate court is in at least as good a position as the trial court to judge whether the legal right enforced through its own opinion is 'important' and 'protects the public interest' and whether the existence of that opinion confers a 'significant benefit to the general public or a large class of persons.' " (*Police Protective League, supra,* at p. 8; see *Wilson v. San Luis Obispo Democratic Central Com.* (2011) 192 Cal.App.4th 918, 924 [when "our published opinion provides the basis upon which attorney fees are sought, de novo or independent review is appropriate because we are in at least as good a position as the trial court to determine whether section 1021.5 fees should be awarded"].)

Police Protective League is distinguishable because American's fee request in this case was not based on *our* prior decision; it was based on the California Supreme Court's decision reversing our decision. In that circumstance, we are in the same position as the trial court in evaluating the impact of a decision by a reviewing court. (*Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2010) 187 Cal.App.4th 376, 381 [reviewing fee award based on Supreme Court decision for abuse of discretion].) In any event, even conducting the less deferential standard of review as American advocates, we would find no error.

II. American's Financial Incentives Outweighed Its Costs of Pursuing Supreme Court Review

The "necessity and financial burden" requirement " ' "really examines two issues: whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys." ' " (*Whitley, supra,* 50 Cal.4th at p. 1214.) We are concerned here with the second prong, i.e., the " 'financial burden of private enforcement.' " (*Id.* at p. 1215.)

As *Whitley* explained, "courts have long construed this language to mean, among other things, that a litigant who has a financial interest in the litigation may be disqualified from obtaining such fees when expected or realized financial gains offset litigation costs." (*Whitley, supra,* 50 Cal.4th at p. 1211.) "[T]he purpose of section 1021.5 is not to compensate with attorney fees only those litigants who have altruistic or lofty motives, but rather all litigants and attorneys who step forward to engage in public interest litigation when there are insufficient financial incentives to justify litigation in economic terms." (*Ibid.*)

"In determining the financial burden on litigants, courts have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. ' "An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity of pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.' [Citation.]" ' [Citation.] 'This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit.' " (*Whitley, supra,* 50 Cal.4th at p. 1215.) The party seeking section 1021.5 fees bears the burden to show its litigation costs transcended its personal interest. (*Millview, supra,* 4 Cal.App.5th at p. 769.)

Quoted in *Whitley*, *Police Protective League* illustrated the cost/benefit weighing process: " 'The trial court must first fix—or at least estimate—the monetary value of the benefits obtained by the successful litigants themselves. . . . Once the court is able to put some kind of number on the gains actually attained it must discount these total benefits by some estimate of the probability of success at the time the vital litigation decisions were made which eventually produced the successful outcome. . . . Thus, if success would yield . . . the litigant group . . . an aggregate of $10,000 but there is only a one-third chance of ultimate victory they wouldn't proceed—as a rational matter—unless their litigation costs are substantially less than $3,000.

" 'After approximating the estimated value of the case at the time the vital litigation decisions were being made, the court must then turn to the costs of the litigation—the legal fees, deposition costs, expert witness fees, etc., which may have been required to bring the case to fruition. . . . [¶] The final step is to place the estimated value of the case beside the actual cost and make the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in this case. . . . [A] bounty will be appropriate except where the expected value of the litigant's own monetary award exceeds by a substantial margin the actual litigation costs.' " (*Whitley, supra*, 50 Cal.4th at pp. 1215–1216, quoting *Police Protective League, supra,* 188 Cal.App.3d at pp. 9–10.)

American argues that *Whitley* "adopted" this "specific method" from *Police Protective League* for evaluating the financial burden requirement. Yet, several courts have declined to apply *Police Protective League*'s methodology, even after *Whitley*, particularly in cases in which the party seeking fees obtained no financial recovery. For example, in *Summit Media,* this Division rejected the plaintiff's analysis under *Police Protective League*, which "depend[ed] on the proposition that the *Whitley*-endorsed test enunciated in *Los Angeles Police Protective League* for weighing costs and benefits must be applied literally in every case, and on the equally dubious proposition that the absence of a monetary award necessarily equates to 'zero' financial benefits." (*Summit Media, supra,* 240 Cal.App.4th at p. 192.) We explained that the question was simply "whether there were 'insufficient financial incentives to justify the litigation in economic terms.' " (*Id.* at p. 193, quoting *Whitley, supra,* 50 Cal.4th at p. 1211.) Under the circumstances of that case, we rejected the plaintiff's claim that its financial incentive in pursuing litigation was zero because it sought no monetary award. (*Summit Media, supra,* at p. 192.) Instead, the plaintiff sought to invalidate a settlement agreement that allowed competitors to maintain digital billboards despite a municipal ban on those billboards. (*Id.* at p. 174.) The record supported the trial court's findings that the plaintiff had an " 'enormous' personal stake in the litigation" surrounding the right to maintain digital billboards on terms with competitors. (*Id.* at pp. 188, 193.) The plaintiff itself believed "it would be ruinous for its business if it could not compete with real parties in interest in the digital billboard industry," and any public benefit was "only incidental to plaintiff's stake in getting a level playing field to compete in a very lucrative business." (*Id.* at p. 188.)

Similarly, in *Millview,* the court declined to follow the methodology in *Police Protective League* in favor of focusing on "a party's financial *incentives* to participate in litigation," not merely actual financial recovery. (*Millview, supra,* 4 Cal.App.5th at p. 772.) Although the plaintiffs in that case did not seek monetary recovery, they successfully challenged a cease and desist order that would have drastically restricted the diversion of water under the plaintiffs' water rights claim. (*Id.* at p. 762.) Had the plaintiffs taken no action, the entry of the order would have dramatically reduced the value of their assets, providing "ample financial incentive for them to challenge" the order. (*Id.* at p. 771.)

Here, American mechanically applies *Police Protective League* to argue that, as a matter of arithmetic, its financial benefit was minimal compared to its $280,000 in costs in pursuing its case to the California Supreme Court. Like *Summit*

Media and *Millview*, we need not conduct this mathematical exercise, which is neither necessary nor sufficient to capture the *actual* financial realities American faced after our adverse decision. As the defendant in these coordinated cases, American sought to avoid significant financial liability after our adverse decision that allowed plaintiffs' interference claim to proceed. Plaintiffs' intentional interference claims in the five coordinated cases challenged 23 contracts in five counties valued at over $14 million. (*Roy Allan, supra,* 2 Cal.5th at p. 510.) Plaintiffs' alleged lost profits reached nearly $1.5 million.[1] Had our decision remained precedential, American faced substantial financial exposure if plaintiffs prevailed on their interference claim.[2]

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[1] Plaintiffs alleged a total of $1,447,288.30 in lost profits in the five complaints: $88,800 for Roy Allan and $240,000 for Martin in Los Angeles County; $479,587.30 for Roy Allan and $30,045 for Martin in San Bernardino County; $136,978 for Roy Allan in San Diego County; $168,511 for Roy Allan and $269,830 for Martin in Riverside County; and $156,818 for Roy Allan in Orange County. Although only the Riverside action was part of the Supreme Court proceedings, any decision from our high court would have impacted American's liability in all of these cases.

[2] American argues plaintiffs failed to offer *evidence* of the financial incentives American had to pursue Supreme Court review and instead merely relied on the allegations of lost profits in the complaints. But this case never progressed beyond the demurrer stage, and we must accept as true all material allegations in the complaints. (*Roy Allan, supra,* 2 Cal.5th at p. 512.) Practically speaking, it would be counterproductive to require the parties to present evidence of plaintiffs' lost profits in order to assess section 1021.5 attorney's fees after American's demurrers were sustained.

That alone created a significant financial incentive to seek Supreme Court review.

Plaintiffs' alleged damages also do not adequately capture the true financial impact if American had not sought review after losing on appeal. (See *Millview, supra,* 4 Cal.App.4th at p. 769 [" 'The relevant issue is " ' "the estimated value of the case at the time the vital litigation decisions were being made." ' " ' "].) At that point, American had two basic choices: petition for review and seek reversal of our decision; or accept our decision and proceed with the interference claims on the merits in the trial court. If it took the latter course, not only would American have faced potential liability of up to $1.5 million in plaintiffs' lost profits, but it would have expended additional costs and fees proceeding with discovery, motion practice, and possibly trial in the five cases. American has not offered evidence of how much it might have spent if it had taken this route, but the costs in litigating five cases on the merits would have presumably been significant.[3] (See *id.* at p. 770, fn. 6 [plaintiffs bore burden to offer evidence of exact dollar value of benefits from pursuing case].)

American also viewed our adverse appellate decision as a costly risk to its overall business. In its petition for review, it sought reversal of our decision in part because of the "far reaching consequences beyond this case and these parties." It worried that "[d]isappointed bidders who were previously

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[3] By the time it sought Supreme Court review, American had already spent $226,417 in attacking the pleadings in the coordinated actions and appealing to this court. From that amount alone we can presume it would have incurred substantial fees in litigating the coordinated cases beyond the pleading stage.

limited to recovering bid preparation costs from the public entity, may now turn to the lowest bidder as the source for recovering lost profits. Accordingly, every award of a public works contract would be vulnerable to litigation because disappointed bidders are now incentivized to sue for lost profits without actually having to perform work under the contract." American also worried that "contractors may face exposure for past contracts long since completed based on allegations that are first made years later," which was true for the contracts at issue here. And American argued that, in light of our decision, "disappointed bidders will be allowed to undertake discovery into their competitor's confidential and proprietary methods for pricing bids." The court in *Roy Allan* also recognized that "[t]he possibility of significant monetary gain may encourage frivolous litigation by second lowest bidders ' "for effort they did not make and risks they did not take." ' " (See *Roy Allan, supra,* at p. 521.) The risks to American's future business was apparent.

Section 1021.5 " 'is intended to provide an incentive to private plaintiffs to bring public interest suits when their personal stake in the outcome is insufficient to warrant incurring the costs of litigation.' " (*Whitley, supra,* 50 Cal.4th at p. 1221; *Summit Media, supra,* 240 Cal.App.4th at p. 193.) Had our prior decision remained precedential, American would have been exposed to $1.5 million in potential liability for its successful bids on the contracts at issue, as well as the additional costs of litigating plaintiffs' interference claims. It also faced possible lawsuits for successful bids on *any public works contract* going forward. American's personal financial stake substantially outweighed the $280,000 in costs for pursuing this case to our

Supreme Court. It did not need the added incentive of section 1021.5 fees to seek review.

As a final argument, American concedes that it "admittedly also enjoyed a financial benefit in defeating Plaintiffs' claims," but contends its benefits were small compared to the benefits conferred on similarly situated parties. (See *Police Protective League, supra,* 188 Cal.App.3d at p. 15 ["Whatever future benefits may be for the League and its membership they are but a small share of the similar benefits which the League's legal action conferred on similarly situated public unions, public employees, and others who deal with the municipal government."].) American relies on the concerns articulated in *Roy Allan* that expanding tort liability of low bidders on public works contracts could "encourage frivolous litigation," "deter responsible bidders from participating in the process," and "potentially interfere with the public's interest in having contracts awarded and performed promptly." (*Roy Allan, supra,* 2 Cal.5th at pp. 521–522.)

We are not persuaded. Although the court in *Roy Allan* discussed the public impact of expanding tort liability, those benefits merely *coincided* with the personal financial benefits conferred on American by avoiding liability in this and future cases. " ' "Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest." ' " (*Millview, supra,* 4 Cal.App.5th at p. 769.)

DISPOSITION

The order is affirmed. Respondents are awarded costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

STRATTON, J.